We are satisfied on the evidence before us that there was no evidence of the power of control over the manner of doing work, which, as we have said earlier, still remains the most important indicia of a contract of service, and therefore agree with the finding of the Industrial Court that the respondent is not a "workman" within the meaning of the Industrial Relations Act.

The appeal is accordingly allowed with costs, and the order of the High Court is set aside. The deposit made by the appellant should be refunded.

Appeal allowed.

Solicitors: *Ranjit Thomas & Kula; Shook Lin & Bok.*

PUBLIC PROSECUTOR v. PONTIAN BAS BERHAD

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Wan Hamzah S.C.JJ.) 12 October 1987 & 25 June 1988]

[Kuala Lumpur – Supreme Court Criminal Application No. 20 of 1987]

Provident Fund – Order of court for payment of arrears – Whether order can be enforced by imposition of imprisonment – Criminal Procedure Code (F.M.S. Cap. 6), s. 283(i)(b)(4) – Employees Provident Fund Act 1951, ss. 16A(1) & 16A(4).

In this case, the respondent had been charged in the magistrate's court for an offence under section 16A(1)(c) of the Employees Provident Fund Act 1951 ("the Act") for failing as an employer to remit contributions of four employees. The manager of the respondent company, who was present in court, pleaded guilty and a fine totalling $4,320 was imposed. This fine was paid. The magistrate also made an order under section 16A(4) of the Act for the respondent company to pay the arrears of contributions to the Employees Provident Fund Board amounting to $28,325. The respondent company failed to pay the arrears. The learned magistrate subsequently acting under section 16A(4) of the Act committed the manger to ten months' imprisonment for default of payment of such arrears. The respondent appealed to the High Court, Johore Bahru and the learned judge of the High Court allowed the appeal and set aside the order of committal by the learned magistrate [see [1987] 2 M.L.J. 646]. The Public Prosecutor then applied for the following question of law to be referred to the Supreme Court:

"Whether the learned judge was right in law in holding that section 283(i)(b)(4) of the Criminal Procedure Code (F.M.S. Cap. 6) can have no application in the enforcement of an order made by the court for payment of arrears of contribution pursuant to section 16A(4) of the Employees Provident Fund Act 1951."

Held: (1) section 16A(4) states in clear terms that the arrears of contribution "shall be recoverable in the same manner as a fine". In short, for purposes of recovery, arrears of contribution are to be treated in the same manner as any fine imposed as punishment for a particular offence;

(2) as the respondent firm has been wound up by a High Court order, no consequential order or alternative order for the recovery of the arrears will be made.

Cases referred to:

(1) *Lee Mun Foong* v. *Public Prosecutor* [1976] 2 M.L.J. 16 (folld).

(2) *Pontian Bas Berhad* v. *Public Prosecutor* [1987] 2 M.L.J. 646 (refd).

SUPREME COURT.

Ng Aik Guan (Deputy Public Prosecutor) for the applicant.

Philip Nainan for the respondent.

Cur. Adv. Vult.

Wan Suleiman S.C.J. (delivering the judgment of the court): This is an application made by the Public Prosecutor under section 66 of the Courts of Judicature Act 1964. Pontian Bas Berhad, the respondent, was charged in the magistrate's court for an offence under section 16A(1)(c) of the Employees Provident Fund Act 1951 on 24 counts of failing as an employer to remit contributions of four employees.

The manager of the respondent company, who was present, pleaded guilty to all the charges and a fine totalling $4,320 was thereupon imposed. This fine was paid. Upon the application of the prosecuting officer, the magistrate also made an order under section 16A(4) of the Act for the respondent company to pay the arrears of contributions to the Board which was certified by the accountant of the Board to amount to $28,325. Although a grace period of two months was allowed, the respondent company failed to pay such arrears.

On 18 October 1986, the learned magistrate acting under section 16A(4) of the Act, which specifies that contributions "shall be recoverable in the same manner as a fine", then committed the manager to ten months' imprisonment for default of payment of such arrears. He imposed this sentence by invoking section 283(i)(b)(4) of the Criminal Procedure Code.

The respondent appealed to the High Court, Johore Bahru against this decision of the learned magistrate. The learned judge allowed the appeal

and set aside the order of committal by the learned magistrate.

His reasons for coming to the decision is adequately set out in the excerpt from his grounds of judgment set out hereunder:

"The specific provisions of section 283(i)(b)(4) and of section 283(i)(c), in my view, prescribe imprisonment in case of default of payment of a fine only when the offender has been in default of payment of a fine per se, *i.e.* a fine imposed as punishment for a particular offence, and then lay down a scale for the maximum term that can be imposed depending on whether the particular offence is originally punishable with imprisonment or not. These specific provisions cannot apply to arrears of contributions upon certification because they were not fines as such. In other words, the power to order a term of imprisonment in default of payment of fine is exercisable only when there has been a failure on the part of the offender to pay a fine imposed for a specific offence and the arrears of contribution in this case have not been imposed as a fine for a specific offence nor can they be construed as having been so imposed. I find support for this view in the case of *Public Prosecutor* v. *Lai Sien Kon* [1978] 2 M.L.J. 110 where Ajaib Singh J. said:

'It must be stressed here that the provisions in section 283 of the Criminal Procedure Code which provide for terms of imprisonment in default of payment of fines have no application in the recovery of a penalty ordered under section 13 of the Prevention of Corruption Act. The penalty is to be treated as a fine but only to the extent and for the purpose of its recovery as such and is not to be treated as a fine in default of which a term of imprisonment may be imposed.'

In that case the accused pleaded guilty on two charges. The first charge was that he resold 17 cinema tickets which is an offence under rule 8(3) of the Entertainments Duty Rules 1953 and the second charge was that he had corruptly offered a gratification to wit $29 to a police constable as an inducement for forbearing to do an act in relation to his principal's affairs, namely, refraining from taking action against the accused under the Rules, an offence under section 4(b) of the Prevention of Corruption Act 1961. On the first charge he was fined $200, in default one month's imprisonment. On the second charge he was fined $500, in default four months' imprisonment. In addition he was ordered to pay $29 by way of penalty to the Government of Malaysia, in default one week's imprisonment. The order to pay $29 to the Government was made under section 13 of the Prevention of Corruption Act whose provisions relating to the recovery of a penalty are similar to those of section 16A(4) of the Act with regard to the recovery of arrears of contributions. Section 13 of the Prevention of Corruption Act reads:

'Where a court convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of this Act, then, if that gratification is a sum of money or if the value of that gratification can be assessed, the court shall, in addition to imposing on that person any other punishment, order him to pay as a penalty, within the time and to the body and in the manner specified in the order, a sum which is equal to the amount of that gratification or is, in the opinion of the court, the value of that gratification, and *any such penalty shall be recoverable as a fine.*'
(italics mine).

I agree with the reasoning of Ajaib Singh J. and it must *a fortiori* apply in the instant case where the arrears of contributions by their very nature constitute a civil debt and were not ordered to be paid by way of a penalty."

The question posed by the learned Public Prosecutor under section 66 of the Courts of Judicature Act 1964 reads:

"Whether the learned judge was right in law in holding that section 283(i)(b)(4) of the Criminal Procedure Code (F.M.S. Cap. 6) can have no application in the enforcement of an order made by the court for payment of arrears of contribution pursuant to section 16A(4) of the Employees Provident Fund Act 1951?"

It is true that section 283 refers to, in the first place, a fine imposed as punishment for a particular offence. However, section 16A(4) states in clear terms that the arrears of contribution "shall be recoverable in the same manner as a fine". In short, for the purposes of recovery, arrears of contribution are to be treated in the same manner as any fine imposed as punishment for a particular offence.

We have no reason to differ from the views, no doubt expressed *obiter*, of the Federal Court in *Lee Mun Foong* v. *Public Prosecutor*[1] at p. 18. That the Employees Provident Fund Act limits recovery of arrears of contribution only to those means available as in a civil debt, as the learned judge (in *Pontian Bas Berhad* v. *Public Prosecutor*[2]) seems to think, is further controverted by the words of section 17(1) which states that all contributions payable under that Act may, *without prejudice to any other remedy*, be recoverable by the Board summarily as a civil debt.

We have been informed that the respondent firm was wound up by a High Court order dated 1 December 1984. Accordingly, we do not propose to make any consequential order under section 66(4) of the Courts of Judicature Act 1964. In other words, the order of the High Court in so far as it relates to the acquittal of the manager A. Mutalib b. Selamat remains. Because of the winding up order, we would also decline to make any alternative order for the recovery of the sum found to be due from the respondent firm to the Employees Provident Fund.

Order accordingly.

Solicitors: *Philip Nainan & Co.*